

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

| | | |
|-------------------------------|---|------------------------------|
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civil Action No. 6:19-cv-305 |
| |) | |
| UNION PACIFIC RAILROAD, INC., |) | COMPLAINT |
| |) | |
| Defendant. |) | |
| |) | |

The United States of America, by the authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency (“EPA”), files this complaint and alleges as follows:

NATURE OF THE ACTION

1. This is a civil action against Union Pacific Railroad, Inc. (“UPRR”) seeking injunctive relief and an assessment of civil penalties for violations of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1251- 1387, for discharges of diesel from a punctured locomotive fuel tank into waters of the United States.

COMPLAINT

JURISDICTION, AUTHORITY AND VENUE

2. This Court has jurisdiction over this matter pursuant to Sections 309(b) and 311(b)(7)(E) of the CWA, 33 U.S.C. §§ 1319(b) and 1321(b)(7)(E), and 28 U.S.C. §§ 1331, 1345 and 1355.

3. Venue is proper in the District of Oregon under 28 U.S.C. §§ 1391 and 1395(a); and Sections 309(b) and 311(b)(7)(E) of the CWA, 33 U.S.C. §§ 1319(b) and 1321(b)(7)(E), because the claim arose in the district and Defendant does business in the district.

DEFENDANT

4. Defendant UPRR is a corporation whose headquarters are in Omaha, Nebraska and which is an operating subsidiary of Union Pacific Corporation.

5. At all times pertinent to this action, UPRR was a “person” within the meaning of Sections 301(a), 311(a)(7), and 502(5) of the CWA, 33 U.S.C. §§ 1311(a), 1321(a)(7) and 1362(5). UPRR operated the train from which the diesel spilled.

6. At all times pertinent to this action, Defendant was the “owner or operator” of the locomotive, as defined in Section 311(a)(6) of the CWA, 33 U.S.C. § 1321(a)(6).

STATUTORY BACKGROUND

7. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and implementing regulations, prohibit the discharge of pollutants to navigable waters by any person, except as in compliance with other sections of the CWA.

8. The CWA defines the term “discharge of pollutants” to include “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). The term “navigable waters” is defined to mean “the waters of the United States.” 33 U.S.C. § 1362(7).

9. Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3), prohibits the discharge of

oil or hazardous substances into or upon the navigable waters or adjoining shorelines of the United States in such quantities as the President determines may be harmful to the public health or welfare or the environment of the United States.

10. Pursuant to Section 311(b)(4) of the CWA, 33 U.S.C. § 1321(b)(4), EPA, acting through its delegated authority under Executive Order No. 11,735, 38 Fed. Reg. 21,243 (Aug. 7, 1973), has determined by regulation that the quantities of oil that may be harmful to the public health or welfare or the environment of the United States include discharges of oil that, *inter alia*, cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines, or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines. 40 C.F.R. § 110.3.

11. Pursuant to Section 311(b)(7)(A) of the CWA, 33 U.S.C. § 1321(b)(7)(A), and the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note, as implemented by the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, any person who is the owner or operator of an onshore facility from which oil is discharged in violation of Section 311(b)(3) of the CWA between December 6, 2013 and November 3, 2015 shall be subject to a civil penalty of up to \$37,500 per day or up to \$2,100 per barrel of oil discharged.

12. Pursuant to Section 311(s) of the CWA, 33 U.S.C. § 1321(s), and Pub. L. 101-380 § 4304, amounts received by the United States for actions under Section 311 shall be deposited in the “Oil Spill Liability Trust Fund” established under 26 U.S.C. § 9509 to, *inter alia*, address future discharges and substantial threats of discharges of oil.

13. The Administrator of EPA may commence a civil action for appropriate relief, including a permanent or temporary injunction, when any person discharges pollutants to navigable waters without a permit. 33 U.S.C. § 1319(b).

GENERAL ALLEGATIONS

14. Defendant is the largest railroad in the United States of America, operating in twenty-three states.

15. On September 12, 2014, a UPRR locomotive was operating in the Packaging Corporation of America railyard in Salem, Oregon. The locomotive failed to stop at a rail de-coupler in the rail yard. A rail de-coupler is a locking device that controls traffic coming onto the track. The rail de-coupler remains in the locked position until the locomotive engineer: (a) pulls the locomotive to a stop, (b) gets out and unlocks the lever with a key, and then (c) pulls the lever to switch the direction of the derail.

16. Instead of stopping the locomotive and following the standard operating procedure, the locomotive was driven over the locked de-coupler, continuing down the track for approximately 300 feet. Driving over the de-coupler ruptured a fuel tank on the locomotive, spilling an estimated 1,500 gallons of diesel onto the spur.

17. Shortly after diesel spilled from the locomotive, the spilled diesel began to enter a stormwater pipe that discharges into the middle fork of Pringle Creek. Discharges of diesel from the stormwater pipe continued, and sheen from diesel discharging from the pipe continued to be visible for at least two weeks after the spill began. Pringle Creek flows into the Willamette River and Pringle Creek is potential habitat for fall chinook salmon, spring chinook salmon, and winter steelhead.

18. Spill responders observed an oil sheen on the middle fork of Pringle Creek shortly after the spill at location of the stormwater pipe discharge. Fish were observed in the middle fork of Pringle Creek while oil was present on the surface.

19. At all times pertinent to this action, the locomotive was an “onshore facility”

within the meaning of Section 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10) and a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

20. Diesel fuel is “oil” within the meaning of Section 311(a)(1) of the CWA, 33 U.S.C. § 1321(a)(1).

21. The middle fork of Pringle Creek flows into the Willamette River. The middle fork of Pringle Creek has a bed and banks and ordinary high mark and flows year round.

22. The middle fork of Pringle Creek is a “navigable water” as defined at Section 502(7) of the CWA, 33 U.S.C. § 1367(7) and a “navigable water of the United States” within the meaning of Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3).

FIRST CLAIM FOR RELIEF

Penalty for Discharges of Spilled Diesel

23. The allegations of the foregoing paragraphs are incorporated herein by reference.

24. Defendant’s release of diesel resulting from the train derailment was a “discharge” as defined in Section 311(a)(2) of the CWA, 33 U.S.C. § 1321(a)(2), and was of a quantity sufficient to cause a sheen upon or discoloration of the middle fork of Pringle Creek or its adjoining shorelines.

25. Beginning on September 12, 2014, Defendant discharged oil in harmful quantities into or upon the middle fork of Pringle Creek, within the meaning of Section 311 (b)(3) of the CWA, 33 U.S.C. § 1321(b)(3). Defendant accordingly is liable for a civil penalty of the greater of (a) up to \$37,500 per day of violation or (b) up to \$2,100 per barrel of oil discharged. 33 U.S.C. § 1321(b)(7)(A).

PRAYER FOR RELIEF

WHEREFORE, based upon all the allegations set forth above, the United States of America requests that this Court:

1. Impose civil penalties on Defendant that are the greater of (a) up to \$37,500 per day of violation or (b) up to \$2,100 per barrel of oil discharged; and
2. Award the United States its costs of this action; and
3. Grant such other relief as the Court deems just and proper.

UNITED STATES OF AMERICA

Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

BILLY J. WILLIAMS
Acting United States Attorney
District of Oregon

/s Michael J. Zevenbergen
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Dated: March 1, 2019

JS 44 (Rev. 06/17)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

United States of America

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
Michael J. Zevenbergen, U.S. Department of Justice
7600 Sand Point Way NE; Seattle, WA 98115
(206) 526-6607

DEFENDANTS

Union Pacific Railroad Company

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF
THE TRACT OF LAND INVOLVED.

Attorneys (If Known)
John Voorhees, Greenberg Traurig, LLP
1200 17th Street, Suite 2400 | Denver, Colorado 80202
(303) 685-7465

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☒ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question
(U.S. Government Not a Party)
- ☐ 4 Diversity
(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|-----------------------------------------|----------------------------|----------------------------|---------------------------------------------------------------|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)Click here for: [Nature of Suit Code Descriptions](#)

| CONTRACT | TORTS | FORFEITURE/PENALTY | BANKRUPTCY | OTHER STATUTES | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise | PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice | <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability | <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions | <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609 | <input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes |

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) _____ ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

33 U.S.C. §§ 1319(b) and 1321(b)(7)(E)

Brief description of cause:

Violation of the Clean Water Act for diesel spill into navigable waters of the United States

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE _____

DOCKET NUMBER _____

DATE

SIGNATURE OF ATTORNEY OF RECORD

03/01/2019

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____